IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL R. SMITH,	)	
	)	No. 143, 2009
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 0304013081
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: October 21, 2009
Decided: December 3, 2009

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices constituting the court *en banc*.

O R D E R

This 3rd day of December 2009, it appears to the Court that:

(1) In this appeal from a trial judge's denial of a motion for post-conviction relief Michael Smith contends that his trial counsel ineffectively represented him by failing to (1) request a jury instruction regarding the credibility of accomplice testimony under *Bland v. State*,[1] (2) "federalize" his objections to the trial judge's refusal to instruct the jury on self defense and the trial judge's "negative self defense" instruction, and (3) pursue his objection to potential jurors seeing Smith in handcuffs and three witnesses in handcuffs and shackles. Because

[1] 263 A.2d 286 (Del. 1970).

Smith's contentions do not establish that his trial counsel's strategy was unreasonable and the record does not support the contention that the strategy prejudiced him, we **AFFIRM**.

(2) On April 17, 2003, Smith and Shane DeShields conspired to rob George Coverdale, DeShields' cousin. Both Smith and DeShields possessed handguns. Coverdale, along with DeShawn Blackwell, met Smith and DeShields at DeShields and Coverdale's grandmother's house. DeShields attempted to rob Coverdale, and Coverdale resisted. Smith shot at Coverdale and Coverdale, who also possessed a firearm, fired at Smith and DeShields. DeShields returned fire, hitting Coverdale in the chest. Smith approached Coverdale and pistol-whipped him. Smith then took jewelry and other items from Coverdale. Blackwell fled from Smith and DeShields. Coverdale died at the scene; Smith and DeShields then fled. The police arrested them, a grand jury indicted Smith and a jury convicted him after trial.

(3) During jury selection, a corrections officer removed Smith from the courtroom. Before removing Smith, the officer put Smith in handcuffs. The jury *venire* was still in the courtroom. Defense counsel objected to potential jurors viewing Smith in handcuffs. The trial judge offered to let counsel question the jury to find out if any of the jurors actually saw Smith in handcuffs. Defense counsel declined because he did not want to highlight Smith's incarceration.

(4) At trial, both DeShields and Blackwell testified against Smith. While DeShields' and Blackwell's testimony of the events varied only slightly, Smith's testimony differed drastically.

(5) When DeShields testified at Smith's trial, DeShields' trial had already concluded. Both parties agreed that they would not inform the jury about the outcome of DeShields' trial. To prevent disclosure of DeShields' conviction, the trial judge gave the pattern instruction for accomplice liability, but omitted the portion referring to DeShields' conviction.

(6) DeShields wore his prison uniform while testifying at Smith's trial. Smith called Duane Dismuke and Keith Nelson as witnesses. Both Dismuke and Nelson were prisoners and they testified in shackles, wearing their prison uniforms.

(7) The trial judge refused to charge the jury on self defense, and informed the parties that he would instead instruct the jury on "negative self defense." Smith objected but the trial judge overruled the objection, because it lacked federal or state constitutional grounds.

(8) The jury convicted Smith of Felony Murder, Second Degree Murder, two counts of First Degree Robbery, four counts of Possession of a Firearm During the Commission of a Felony, and Second Degree Conspiracy. The trial judge sentenced him to life in prison plus 142 years.

(9) We affirmed Smith's convictions and sentence on direct appeal.[2] Smith filed a timely motion for post-conviction relief, pursuant to Rule 61, on April 13, 2007.[3] Smith's former attorneys responded,[4] and the trial judge denied Smith's Rule 61 motion.[5] Smith appeals from that judgment.

(10) We review a trial judge's denial of post-conviction relief for abuse of discretion[6] and we review Smith's allegations of constitutional violations *de novo*.[7]

(11) To prevail on a claim of ineffective assistance of counsel, a defendant must prove that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[8] With respect to the first prong, "[c]ounsel's efforts . . . enjoy a strong presumption of reasonableness."[9] For a defendant to satisfy the second prong, the defendant must prove that the trial counsel's ineffectiveness prejudiced him and must "state

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[2] *Smith v. State*, 913 A.2d 1197 (Del. 2006).

[3] Smith's current attorney did not represent him at trial or in his direct appeal. *State v. Smith*, 2009 WL 597267, at *1 n.1 (Del. Super. Feb. 18, 2009).

[4] The trial judge did not hold an evidentiary hearing. *State v. Smith*, 2009 WL 597267, at *1.

[5] *Id.*

[6] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

[7] *Id.*

[8] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

[9] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

with particularity the nature of the prejudice experienced."[10] While the test requires that a defendant prove both prongs, we may analyze the prejudice claim first "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . ."[11]

(12) Smith argues that the trial judge abused his discretion when he held that even though his trial counsel failed to request the complete *Bland v. State* accomplice jury instruction, he nevertheless provided effective representation.

(13) While we no longer require a rigid application of pattern accomplice jury instructions,[12] a defendant does have "the unqualified right to a correct statement of the law."[13] Trial judges may reasonably rely on pattern jury instructions[14] or may craft their own jury instructions.[15] A trial judge must always give the jury "reasonably informative and not misleading"[16] instructions.

(14) In this case, the parties agreed that the jury should not know the outcome of DeShields' trial. The trial judge omitted the portion of the accomplice

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[10] *Id.* at 1196.

[11] *Strickland*, 466 U.S. at 670.

[12] *See Bordley v. State*, 832 A.2d 1250, 2003 WL 22227558, at *2 (Del. Sep. 24, 2003) (TABLE).

[13] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998).

[14] *See Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000).

[15] *See Bordley*, 2003 WL 22227558, at *2.

[16] *Baker v. Reid*, 57 A.2d 103, 113 (Del. 1948).

jury instruction that included details of DeShields' conviction. Other than that, the trial judge charged the jury with the complete pattern jury instruction. Defense trial counsel made a reasonable tactical decision to agree to omit DeShields' conviction from the instruction. Smith has not shown that his trial counsel's decision prejudiced him in this respect. We hold that the trial judge did not abuse his discretion by concluding that counsel's agreement to omit a portion of the specific *Bland* jury instruction did not result in ineffective representation.

(15) Smith asserts that the trial judge also abused his discretion by holding that counsel's failure to "federalize" his objections to the trial judge's refusal to instruct the jury on self defense, and also his "negative self defense" instruction did not constitute ineffective assistance of counsel. Smith asserts that his trial counsel should have grounded his objections in the right to a fair trial in order to preserve a possible federal *habeas corpus* review.

(16) We do not consider a failure to preserve an issue for federal *habeas corpus* review to be prejudicial.[17] We limit the scope of prejudice to the outcome of the trial or the appeal.[18] Because Smith's claim of error deals only with failure to preserve an issue, his unsupported, conclusory allegations fail to establish

[17] *State v. Fudge*, 206 S.W. 3d 850, 861 (Ark. 2005); *Johnson v. State*, 157 S.W. 3d 151, 166 (Ark. 2004) *cert denied*, 543 U.S. 932 (2004).

[18] *Johnson*, 157 S.W.3d at 151.

prejudice.[19] We hold that the trial judge did not abuse his discretion when he held that trial counsel's failure to "federalize" objections to jury instructions constituted ineffective representation.

(17) Smith next asserts that the trial judge abused his discretion when he held that trial counsel's failure to question jurors about whether they saw Smith in handcuffs did not constitute ineffective assistance of counsel. Smith contends that trial counsel should have consulted with him before deciding not to question the jurors.

(18) We have held that prejudice does not occur where potential jurors briefly view a defendant in handcuffs, the trial judge dismisses jurors who saw the defendant in handcuffs, and the trial judge orders that the defendant not appear in front of the jury in handcuffs again.[20]

(19) In this case, potential jurors may have briefly viewed Smith in handcuffs but Smith did not appear in front of the jury in handcuffs again, and the trial judge gave Smith's trial counsel the opportunity to question selected jurors about whether they had, in fact, seen Smith in handcuffs. Smith's trial counsel, however, declined – making the tactical decision not to highlight the fact that the State had Smith in custody during trial.

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[19] *See Ayers v. State*, 2002 WL 1751794, at *1 (Del. July 24, 2002).

[20] *Duonnolo v. State*, 397 A.2d 126, 130-31 (Del. 1978).

(20) Smith has failed to establish that trial counsel's strategy was unreasonable or prejudicial. We will not second guess reasonable trial strategy and the record does not support the contention that Smith's brief appearance prejudiced any potential jurors against him. We hold that the trial judge did not abuse his discretion when he held that Smith's trial counsel's decision not to question potential jurors who might have seen Smith in handcuffs did not constitute ineffective assistance of counsel.

(21) Smith finally contends that his trial counsel's failure to object to two defense witnesses, Dismuke and Nelson, and one prosecution witness, DeShields, testifying in their prison uniforms and shackles constituted ineffective assistance of counsel. Smith's trial counsel elicited from Dismuke and DeShields that the State had them in custody. Nelson volunteered, without any prompting, his own incarceration.

(22) Smith has failed to show that these witnesses' testifying in prison uniforms and shackles prejudiced him. "No prejudice can result from seeing that which is already known."[21] When many witnesses come from a criminal subculture, "[i]t is not reasonably likely the jury was so swayed by the security environment it disregarded its duty to assess evidence on the issue of . . .

[21] *Estelle v. Williams*, 425 U.S. 501, 507 (1976) (*quoting Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973)).

[petitioner's guilt]."[22] We hold that the trial judge did not abuse his discretion when he held that trial counsel's failure to object to the presence of witnesses in handcuffs and shackle constituted ineffective assistance of counsel.

(23) None of Smith's contentions establish either that his trial counsel's tactics or strategy were unreasonable or that any tactic or strategy employed unfairly prejudiced the outcome.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[22] *Angel v. Roe*, 2005 WL 2105222, at *7 (E.D. Cal. Aug. 30, 2005), *report and recommendation adopted at* 2006 WL 37019 (E.D. Cal. Jan. 4, 2006), *aff'd* 256 *Fed. Appx.* 907 (9th Cir. Nov. 15, 2007).